United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7574

To be argued by
MATHIAS L. SPIEGEL

B P/S

In the United States Court of Appeals

For The Second Circuit

LOUIS BLECKER and RUTH BLECKER,

Plaintiffs-Appellants,

-against-

LAZARD FRERES & CO., MEDIOBANCA BANCA di CREDITO FINANZIARIO-SOCIETA PER AZIONI, LES FILS DREYFUS ET CIE, S.A., LAZARD FRERES ET CIE, INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, RICHARD E. BENNETT, EUGENE R. BLACK, RAYMOND L. BRITTENHAM, GEORGE R. BROWN, FRANCIS J. DUNLEAVY, RUSSELL F. ERICKSON, HAROLD S. GENEEN, ARTHUR M. HILL, J. PATRICK LANNAN, R. NEWTON LAUGHLIN, JOHN A. McCONE, RICHARD S. PERKINS, HART PERRY, WARREN LEE PIERSON, FELIX G. ROHATYN, TED B. WESTFALL,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

MATHIAS L. SPIEGEL
NETTER & SPIEGEL
Attorneys for Plaintiffs-Appellants
18 East 48th Street
New York, New York 10017
(212) 752-3122

MATHIAS L. SPIEGEL
Of Counsel

(10314)
LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850
New York, N.Y. (212) 563-2121
Philadelphia, Pa. (215) 563-5587
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No. 76-7574

LOUIS BLECKER & RUTH BLECKER,

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vs.

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Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

INTRODUCTORY STATEMENT

On February 14, 1977 the District Court filed a Memorandum and Order granting appellants leave to file a second amended and supplemental complaint (A21-A64). In its order the District Court struck certain proposed allegations of the second amended complaint and refused to vacate the stay of this action during the pendency of *Bernstein v. Mediobanca et al.*, 73 Civ. 4057 (WCC). Appellants address themselves to the District Court's Memorandum and Order.*

The record before this Court amply supports appellants' allegations of a unitary conspiracy, uncovered by plaintiffs' counsel in *Herbst v. ITT*, Civ. 15, 155, District of Connecticut, in violation of the anti-fraud provisions of the securities laws and; establishes the base upon which appellants' allegations of fraudulent concealment and fraud upon the District Court with respect to the stay rest (A3, Affidavit of Mathias L. Spiegel dated January 14, 1975).

I.

The facts upon which appellants' allegations of fraud upon the District Court with respect to the inception and continuation of the stay (A36-A37) rest were never before Judge Tenney (3). When appellants filed their amended complaint (March 11, 1974) and moved to vacate the stay, Judge Tenney (A8) and appellants' counsel believed that the role of counsel in *Bernstein* in *Herbst* was that of "pre-trial counsel" (A102-A103).

The only question before Judge Tenney was whether, in view of the purported withdrawal from *Herbst* of counsel in *Bernstein*, the "conflict of interest" asserted by appellants still was material.

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* Pages in parentheses refer to the District Court Memorandum and Order filed February 14, 1977, copies of which have been filed with the clerk of the Court of Appeals as information to the panel.

It is alleged that, the affidavits submitted to the District Court on this question were false and misleading and; the submission of the affidavits to the District Court are acts in furtherance of the fraudulent concealment of the conspiracy (A33-A37). *Compare* A108-A115 *with* A102.

Thus, the "state of the affidavits" before Judge Tenney cannot be disregarded, as did the District Court (4). Judge Tenney's investigation was predicated upon the truth of the affidavits; they formed the basis for his conclusion:

> "Permission to withdraw was granted inasmuch as *all parties consented*" (4) (A14-A15). (Emphasis added.)

It is alleged that the "consent" was an act of fraudulent concealment of the conspiracy (A50).

Leave to amend to assert the fraud upon the District Courts should have been granted. *Gumer v. Shearson, Hammill & Co.*, 516 F.2d 283, 287 (2d Cir. 1974). *Accord, Clay v. Martin*, 509 F.2d 109, 113-114 (2d Cir. 1975). *See also Rogers v. Valentine*, 426 F.2d 1361 (2d Cir. 1970).

II.

There is support further in the record before this Court of the continuing conspiracy to avoid judicial inquiry into their claims sought to be alleged by appellants. Judge Blumenfeld had before him on the *Herbst* settlement (A147-A150) appellants' second amended complaint, as well as the history of this action in the District Court (A137-A146). The fraud upon the District Court alleged by appellants has its inception in Judge Blumenfeld's Court (A108-A115).

Judge Blumenfeld having concluded in *Herbst* that it would not be "appropriate to approve the issuance of the proposed

releases" (A207), appellees set sail in the more favorable waters of the state court, without appellants' participation or consent (A328-A330), to effect a parallel settlement. *See, Semmes Motor Inc. v. Ford Motor Company,* 429 F.2d 1197, 1203 (2d Cir. 1970). Appellants have filed objections to the state court settlement asserting that the settlement as proposed is an act in furtherance of the conspiracy to avoid judicial inquiry into their claims.

The Chief Judge of the District Court, *United States v. International Business Machines Corp.,* 66 F.R.D. 223, 228-229 (S.D.N.Y. 1975) has quoted Judge Lumbard:

> "Where there is a lack of prejudice to the opposing party and the amended complaint is obviously not frivolous, or made as a dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion. . . only where prejudice is shown or the movant acts in bad faith are courts protecting the judicial system or other litigants when they deny leave to amend a pleading." *Howey v. United States,* 481 F.2d 1187 (9th Cir. 1973).

Wright & Miller, Federal Practice and Procedure: Civil §§1484, 1487; 3 Moore's Federal Practice ¶¶15.08 [3] [4] (1974).

On the record before this Court the District Court was in error in refusing to grant the relief sought by appellants and, in concluding that appellants:

> "have an alternate, and more appropriate, forum for raising their claims that the proposed settlement is fraudulent" (8).

See, Semmes Motor Inc. v. Ford Motor Company, supra, 429

F.2d 1202; *Mattel, Inc. v. Louis Marx Co.*, 353 F.2d 421, 423-4 (2d Cir. 1965).

The District Court's approach to this suit, flys in the face of the universal mandate of the federal courts that suits should be tried on the merits, particularly anti-fraud violations of the securities laws first brought in the federal court. *Cf. Allegaert v. Perot*, F.2d (*Slip Op.* 1521, 1530-1531, January 25, 1977).

As in *Allegaert*, this is not an ordinary dispute between private parties with public interest overtones, rather it rises out of one of the most celebrated mergers in history, one that ran afoul of Securities & Exchange Commission, Internal Revenue Service, and Justice Department objections, and still is the subject of a Securities & Exchange Commission investigation.

III.

The unitary conspiracy and fraudulent concealment thereof alleged by appellants, is not found in the state court action (A217-A226), nor in the complaints of any of the intervenors in the state court. *Compare* A21-A64 and A88-A108 *with* A229-A274.

Pre-trial Reports Nos. 2 and 3, filed in *Herbst*, annexed to the affidavit of Mathias L. Spiegel dated January 14, 1975 (A3), lay bare the unitary conspiracy alleged by appellants. These Reports raise questions going to the merits so serious, substantial, and difficult as to make appellants' allegations fair ground for litigation and thus for more deliberated investigation than has thus far been afforded by the District Court. *San Filippo v. United Bro. of Carpenters and Joiners*, 525 F.2d 508, 511 (2d Cir. 1975); *Gulf & Western Industries Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687, 692-3 (2d Cir. 1973); *Sonesta International Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973); *Semmes Motor, Inc. v. Ford Motor Company, supra*, 429 F.2d 1206.

The allegations are supported by the IRS ruling of March 6, 1974 (A188 fn. 1).

The balance of hardships tips decidedly in favor of appellants. Stayed by the federal court, appellants stand little chance of persuading the state court that a fraud has occurred in the federal court.

Once the state court settlement was agreed upon, the parties consented to the intervention in the state court of plaintiffs in *Bernstein* and in *Boehm* (A328-A330) and, the attorneys for the ITT stockholders linked hands with appellees to defend their joint handiwork. *See Allegheny Corp. v. Kirby,* 333 F.2d 327, 347 (2d Cir. 1964), *aff'd. by an equally divided court,* 340 F.2d 311 (2d Cir.) (*en banc*), *cert. granted,* 381 U.S. 933 (1965), *cert. dismissed,* 384 U.S. 28 (1966). *Compare* A199-A200, footnote 15 *with* (6-7).

If the settlement in the state court is approved despite appellants' objections, it will not be easy for appellants to attack the settlement and show that its signers abandoned corporate claims through neglect or self-dealing. *See Wolf v. Barkes,* 348 F.2d 994, 997-998 (2d Cir.) *cert. denied,* 382 U.S. 941 (1965). *Compare* A200-A201 *with* (7). Moreover, unless appellants' allegations of a continuing conspiracy to avoid judicial inquiry into their claims and their motion to name as defendants the new ITT (A19) directors are allowed, this action will be terminated by the vote of the newly immunized Board of Directors of ITT. *See* A203, footnote 18.

IV.

Where as here hearings were not held, and the decisions of the District Court are based on pleadings, affidavits and exhibits, the credibility of testimony is not at stake. This Court is not limited to reviewing the District Court's exercise of discretion. It is in as good a position as the District Court to read and

interpret the documents that comprise the record. Consequently this Court may exercise its discretion and review the papers de novo. *San Filippo v. United Bro. of Carpenters and Joiners, supra,* 525 F.2d 508; *Dopp v. Franklin National Bank,* 461 F.2d 873, 879 (2d Cir. 1972). *See, Orvis v. Higgins,* 180 F.2d 537, 539 (2d Cir. 1950), *cert. denied,* 340 U.S. 810 (1950).

V.

While the refusal of the District Court (February 14, 1977) to vacate the stay itself is not appealable under 28 U.S.C. §1292(a)(1), where as here this Court has unquestioned jurisdiction of the cause, it would be absurd to require it to close its eyes to another interlocutory order which might infect the entire proceeding with error and require reversal after large expenditure of judicial and professional time. *Semmes Motor, Inc. v. Ford Motor Company, supra,* 429 F.2d 1201; *Deckert v. Independence Shares Corp.,* 311 U.S. 282, 286-7 (1940); *National Equipment Rental Ltd. v. Fowler,* 287 F.2d 43, 45 (2d Cir. 1961); 9 Moore's Federal Practice, ¶ 110.25[1] (1974).

VI.

Appellees' contention that the injunction sought is proscribed by the Federal Anti-Injunction Statute, 28 U.S.C. §2283, is without merit. Not only is the relief sought not within the purview of the statute, but even if it were, on the record before this Court the relief sought is in aid of federal jurisdiction.

Appellants do not have an adequate remedy at law. *Huffman v. Pursue,* 420 U.S. 592, 600-601 (1975). Despite the conclusion of the *Herbst* court, and in face of the allegations of the second amended complaint (A38, A58-A61), ITT proceeds in the state court (A227) without appellants' participation or consent (A212-A216, A313-A317).

There was no target in the state court at the time relief was sought from the District Court (A183). Intervention in the state court action by plaintiffs in *Bernstein* and in *Boehm* did not occur until November 22, 1976 (A328). *See, Neifeld v. Steinberg,* 438 F.2d 423, 432 (3rd Cir. 1971); *cf. Vernitron Corp. v. Benjamin,* 440 F.2d 105 (2d Cir.), *cert. denied,* 402 U.S. 987 (1971).

The cases cited on pages 12-13 of appellees' brief, are irrelevant. Mr. Justice Black said in *Younger v. Harris,* 401 U.S. 37 (1971):

> "We express no view about the circumstances under which federal courts may act when there is no prosecution pending in the state court at the time the federal proceeding is begun." *Id.* at 41.

In the absence of a pending state court proceeding at which the injunction sought is directed,

> "The relevant principles of equity, comity and federalism have little force. . . ."

Steffel v. Thompson, 415 U.S. 452, 462 (1974). *Accord, Huffman v. Pursue, supra,* 420 U.S. 592; *Mitchum v. Foster,* 407 U.S. 225 (1972); *Samuels v. Mackell,* 401 U.S. 66, 73-74 (1971); *Lake Carriers' Ass'n. v. MacMullan,* 406 U.S. 498, 509 (1971).

In face of appellants' allegations of fraud (A34-A38, A55-A61), the intervention of plaintiffs in *Bernstein* and *Boehm* in the state court proceedings and the attempt to encompass appellants' claims in the amended and supplemental state court complaint filed on November 22, 1976, go to the core of the District Court's authority and responsibility.

CONCLUSION

The order of the District Court filed February 14, 1977 denying in part appellants' motion for leave to file an amended complaint is an abuse of discretion and should be reversed.

The relief sought in our brief in chief also should be granted.

Respectfully submitted,

NETTER & SPIEGEL
Attorneys for Plaintiffs-Appellants

Mathias L. Spiegel
On the Brief

Dated: New York, N.Y.
February , 1977

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES
COURT OF APPEALS
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Defendants-Appellees,

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Victor Ortega, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1715 Lacombe Avenue; Bronx, New York

That on the 4th *day of* Marh *19* 77 *at* 1. 100 Park Avenue: N.Y.C.
2. 345 Park Avenue: N.Y.C.

deponent served the annexed Reply Brief *upon*
1. Wormser Keily Alessandroni Mahoney & McCann, Esqs.
2. Paul Wiess Rifkind Wharton & Garrison,

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 4th *day of* March, *19* 77

Victor Ortega

Victor Ortega

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977